

COVID-19: Managing employees during a shutdown of non-essential services

With the Government announcing further restrictions on non-essential services, we set out below some of the options available to employers to manage their employees during this period. These are complicated and fast moving circumstances, and we recommend that you seek specialist advice before making important decisions that affect your workforce.

At a glance

	Change working arrangements	Role adjustments	Voluntary pay cut or reduced hours	Paid leave	Voluntary unpaid leave	Stand down
Agreement of employee required	In some circumstances, but generally not required.	In some circumstances	Yes	In most circumstances	Yes	No
Description	Employees may be directed to work from home, and/or changes to rostering may be made to facilitate workforce isolation or splitting.	The duties and responsibilities of employees are varied so that the employee can perform other useful work.	Employees agree to work reduced hours or at a reduced wage for a period of time.	Employees may choose to take annual leave, personal/carer's leave/ long service leave.	An employee may agree to take a period of unpaid leave.	Employers may stand down employees where there is a stoppage of work for any cause for which the employer cannot reasonably be held responsible.
Pay	Normal	Normal	Reduced	Paid	Unpaid	Unpaid
Considerations	<ul style="list-style-type: none"> Compliance with applicable industrial instruments/employment contracts. Employers will need to consider whether employees can safely perform their duties from home. 	<ul style="list-style-type: none"> The employee's consent may be required if the variation to duties is not consistent with the employee's contract or an applicable industrial instrument. Employers will need to consider what duties may fall into the employee's skillset. 	<ul style="list-style-type: none"> Employees must not be coerced or pressured to agree to these arrangements. Some industrial instrument obligations can only be varied by way of a formal application to the Fair Work Commission 	<ul style="list-style-type: none"> Carer's leave may be taken when an unexpected emergency affects a member of the employer's family (this might include school closures). Award/agreement free employees may be directed to take annual leave where the direction is reasonable. 	<ul style="list-style-type: none"> Employers may wish to consider whether it is feasible to allow employees to access annual or long service leave in advance. Employers may consider short distinct periods of unpaid leave (e.g. one week unpaid leave/one week paid leave). 	<ul style="list-style-type: none"> Terms relating to stand down in an enterprise agreement or employment contract will override the general statutory power of stand down.

The details...

There are a number of strategies that an employer can adopt in order to weather the challenges faced in light of the COVID-19 pandemic, ranging from changing employees' working arrangements to a stand down of all or part of a business.

We set out below a high level strategy of some of the strategies that are available to their employees. The feasibility of any of the suggestions outlined below will depend, of course, on the financial circumstances of the business, the terms of any employment contracts in place and any applicable enterprise agreements or modern awards.

We recommend obtaining appropriate advice before implementing any of the strategies outlined below, as these general principles are subject to exceptions and qualifications that may have a significant impact on their application to your business.

Stand down

The *Fair Work Act 2009* (Cth) (**FW Act**) provides a general power to 'stand down' employees without pay in very limited circumstances. If an employment agreement or enterprise agreement contains terms that deal with stand down, those terms will override the general statutory power.

Under the FW Act, employees can be stood down if the employee cannot be usefully employed because of (amongst other reasons) a stoppage of work for any cause for which the employer cannot reasonably be held responsible.

This is a very serious decision for an employer to take, and if it is improperly applied, an employer may be liable to employees for unpaid wages during the stand down period. The power to stand down employees is usually relied in the context of a natural disaster or, for example, where machinery in a factory breaks down or there is strike action. It will not be enlivened simply due to an economic downturn. It must be established that there has been a "stoppage of work" and that the employer cannot reasonably be held responsible for such a stoppage.

Examples of circumstances in which it is likely that an employer would be entitled to stand down employees include where:

- the business is prevented from operating due to Government directives;
- suppliers of the business are unable to provide any stock, resulting in the business having no stock to trade;

- access to the business' premises has been restricted or prevented due to the actions of a third party; and/or
- due to high risk of virus transmission, it is not possible for the business to remain operational.

Implementation of a stand down is likely to enliven the employee consultation obligations set out in enterprise agreements and modern awards.

Employees who are stood down may access accrued annual or long service leave. Additionally, if an employee falls ill during a period of stand down, the employee will be entitled to access personal leave (subject to, if required, providing evidence that would satisfy a reasonable person that the leave is being taken for a permissible reason).

If an employee wishes to resign from employment after being stood down, the employee will be required to provide the usual period of notice. While the employee's usual statutory entitlements will need to be paid out on termination (e.g. accrued but untaken annual leave), the employee will not need to be paid for any part of the notice period that overlaps with the stand down period.

Employees working from home

For many businesses, it may be possible to avoid the need to shut down all or part of the business. Many employers have already started encouraging employees to work from home where possible.

At all times, it must be kept in mind that employers have an obligation to provide a safe working environment for employees, including where the employee is working from home. Self-assessment checklists are a common form of ensuring that employees are able to safely perform their duties from home, and an organizational work-from-home policy can assist in this respect.

For some employees, some changes may need to be made to their duties to enable them to effectively work from home. See "Changes to employees duties" for further information on this.

If an employee resists an employer's recommendation that work be performed from home, it may be possible to direct the employee to work from home, assuming the employee has no explicit entitlement in an employment contract or industrial instrument to work at the office.

The details...

Changes to employee duties

It may be necessary to make changes to employees' duties in order to ensure that they are able to be usefully employed despite changes to working arrangements. For example, an employee who usually attends to a reception desk may be required to perform other clerical duties at home.

In some circumstances employers may be entitled to vary the duties of an employee so long as the duties assigned to the employee are within the employee's skill and competence. Again, this may be subject to the requirements of an employee's contract or industrial instrument. Where possible, both from a legal perspective and in order to maintain employee engagement, we recommend consulting with employees prior to substantially changing their duties.

Accessing leave

In the first instance, assuming that it is sustainable from a cashflow perspective, employees should be encouraged to voluntarily take accrued annual or long service leave.

Some employees and employers may agree to extend the duration of an employee's leave by taking it at half pay for twice as long. Some industrial instruments may contain explicit provisions facilitating such arrangements. In the absence of such explicit provisions, this can be facilitated by treating the employee as though they were on unpaid leave for half of the relevant pay period.

We note that, particularly for employers whose employees are highly engaged, consulting with employees and entering into an agreement to take periods of paid or unpaid leave in times of economic uncertainty has been an effective mechanism to reduce employment costs whilst avoiding significant cuts to employee positions. Where such agreement cannot be obtained, however, it may be necessary to direct employees to take leave.

Directions to take annual leave

In some circumstances, employees may be directed to take annual leave. For example, where the employee has accrued a large amount of leave. For most employees who are covered by a modern award, employees must have accrued 8 weeks of annual leave before they can be directed to take annual leave, and must be given at least 8 weeks' notice. Generally, award-covered employees may only be directed to take leave if the employee will have at least 6 weeks' accrued leave at the end of the period of directed leave. Of course, regard should be had to the specific terms of the relevant award.

For award-free employees, a direction to take leave must be "reasonable". We recommend taking guidance from the position under most modern awards outlined above in determining what is "reasonable".

Business shutdowns

Businesses may be entitled to require employees to take accrued annual leave when the business shuts down, for example, over the Christmas/New Year period. For award-covered employees, a period of 4 – 8 weeks' notice may be required before such a shutdown. For award/agreement free employees, a reasonable period of notice will be required, generally in the vicinity of 4 – 8 weeks' notice.

Employees who do not have sufficient paid leave accrued may be required to take unpaid leave for the remainder of the shutdown period.

Such shutdowns are not intended to be indefinite, and it is unlikely that a shutdown period in excess of one or two weeks would be considered reasonable.

If a longer period is required, or a reasonable period of notice cannot be provided, refer to the "stand down" section below for further information.

Long service leave

Each state and territory has its own legislation in relation to long service leave. We recommend obtaining advice in relation to the requirements in the applicable state/territory prior to seeking to direct employees to take long service leave or seeking to otherwise alter long service leave arrangements.

Unpaid leave

Employees cannot be directed to take unpaid leave unless they have been stood down (refer to "stand down" below). However, employees and employers may enter into an agreement by which the employee takes a period or periods of unpaid leave.

The details...

Reducing pay and/or hours

Where employers are not prevented from having employees attend the workplace during the shutdown of non-essential services, or when employers are permitted to have employees return to the workplace, it may be necessary to consider managing employment costs.

Reducing the ordinary hours of work or pay for full-time and part-time employees can only be facilitated with the agreement of the relevant employees. Examples of different approaches include:

- agreeing that all full-time employees will work on a part-time basis for a defined or indefinite period (e.g. 5 days/week to 3 days/week);
- employees agreeing to a temporary or indefinite pay cut;
- employees agreeing to forego previously communicated bonuses/pay rises; and/or
- imposing a ban on overtime work (for which employee consent may not be required).

Any agreements reached with staff must be consistent with your obligations under an industrial instrument and the FW Act and should be properly documented.

Split workforces and other changes to rostering

Where employers are not prevented from having employees attend the workplace during the shutdown of non-essential services, or when employers are permitted to have employees return to the workplace, it may be necessary to consider making changes to some employees' rostering arrangements.

For example, changes can be made to split workforces, ensuring that contact is minimised (or eliminated) between different parts of the workforce. For example, shifts can be arranged to ensure that Group A is never rostered to work at the same time as Group B.

For white collar employees, for example, Group A may be required to work from home whilst Group B is allowed to access the office. Access to the office could be alternated between the groups on a weekly basis, allowing for a 'deep clean' of workspaces over the weekend.

The ability of an employer to change roster arrangements will depend on the specific employment contracts and industrial instruments in place. In some cases, employee consent and/or consultation may be needed prior to implementing changes to rosters.



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